

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 11,766  
 )  
Appeal of )

## INTRODUCTION

The petitioner applies to the Board for an order expunging from the registry maintained by the Department of Social and Rehabilitation Services (SRS) a report of child sexual abuse. As a preliminary matter the Board has determined that the fact that the petitioner was herself a minor at the time the alleged incident occurred and has now reached adulthood does not, in and of itself, require that the report in question be expunged. In an Order dated December 16, 1993, the Board remanded the matter to the hearing officer to render proposed findings of fact on the merits of the matter.

## FINDINGS OF FACT

In June, 1988, SRS received a report from the Vermont State Police that the mother of a five-year-old girl and a four-year-old boy had filed a complaint against the petitioner alleging that the petitioner had engaged in inappropriate sexual activity with the children while she had been babysitting for them the week before. At the time the petitioner, herself, was fifteen years old.

The complaint was investigated by an SRS social worker

and a state trooper who interviewed the two children. The young boy told the investigators that while babysitting him and his sister the petitioner played a "game" with him in which the petitioner pulled down his pajama pants and fondled and kissed his penis (see infra). When confronted with the allegations the petitioner admitted she had babysat the children, but on the advice of an attorney she declined to answer any further questions.

Based on its investigation SRS determined that the report of sexual abuse was "founded" and entered it on its child abuse registry. As was its unfortunate practice at that time, SRS did not notify the petitioner of this determination.

In October, 1988, a juvenile delinquency petition was filed against the petitioner in Juvenile Court. In December, 1988, the Court dismissed the petition on legal grounds without issuing any findings or conclusions on the "merits" of the case.

The petitioner heard nothing more about the incident until Fall, 1992. She was then twenty years old (having turned eighteen in 1990) and she had recently obtained employment at an early childhood education program. Some months after the petitioner had begun working, the program's director was told by a parent that the petitioner had committed child abuse. After the director sought to confirm the report with SRS, the Department, on December 21, 1992, notified the petitioner for the first time of the report in

its registry. SRS then informed the petitioner's employer that it would be in violation of its license if it continued to employ the petitioner, and the petitioner was suspended from her job pending the outcome of these proceedings.

The first hearing in this matter was held on April 1, 1993. At that time SRS introduced, over the hearsay objections of the petitioner (see discussion infra), the testimony of the alleged victim's mother and the state police officer and the SRS social worker who initially investigated the allegations. Also introduced over the petitioner's objections were the written investigation report of the state police officer and the written casework notes of the social worker.

The mother testified that on or about May 27, 1988, she hired the petitioner to baby-sit her son and daughter, then age four and five respectively. (Hereinafter the boy will be referred to as B., the girl as G.) It was the first time the petitioner had babysat the children. When the petitioner arrived at the house the children were in the bath. The petitioner was instructed to finish the children's bath, give them a snack, and put them to bed. When the mother returned home later that evening, the children were sleeping and nothing seemed amiss.

The mother stated that two or three days later, however, while she was riding with the children in the car, her daughter, G., told her that the petitioner had touched B.'s

"privates" when she had babysat them a few days previous. When the mother inquired further, G., who was usually precocious, insisted that B. tell about it. B. then told his mother that the petitioner had played a "game" with him that involved touching and kissing his penis. A few days later the mother reported what her children had told her to the state police.

A state police officer testified that he interviewed the children on June 3, 1988, at the district offices of SRS. Present with him at the interview was a SRS social worker and the children's mother, although the mother did not participate in the interview with the children. At the time, the officer was trained and experienced in child abuse investigations. His testimony regarding the interview was consistent with the following written report of the interview that he submitted at the close of his investigation of the case:

We met with the Complainant and learned that on Wednesday 6-1-88 while she and the Victim were in the car, [G.] told her of the incident.

The Complainant initially reported this incident to the State Police, St. Albans office on the late evening of 6-2-88 and was advised that the case would be followed up by a Trooper in the daytime.

This officer was notified of this case and called the Complainant and scheduled the interview. I also called SRS and Ms Keefer was subsequently the assigned Social Worker. This officer observed the victim who appeared (sic) to be quite articulate in spite of his age, and had a good knowledge about "good touching and bad touching". This officer attempted to ask [G.] freely if anything had happened when the Accused baby sat for she (sic) and her brother (Victim).

[G.] responded "Didn't do it to me, did it to [B.] (Victim)." This officer asked [G.] what, and she refused to say what she saw. This officer next talked with the Victim. The Victim was somewhat shy, however, he was attentive and did talk with us. The Victim advised that the Accused babysat he and his sister, that she gave them a bath, and that she put alot (sic) of water in the bath tub. The Victim also recalled that he had a bubble bath, got into his pajamas. The Victim advised that he was sitting on the living room couch along with he (sic) Accused when they played a game.

When asked what this game was, the Victim advised that the Accused had him lay down on his back on the couch and she pulled his Pj's down to his feet. The Victim advised that he was wearing underpants and that the Accused then pulled these down to his feet. The Victim advised that the Accused touched his "PeePee" with her hands. This officer asked what he meant by PeePee and he pointed to his genital area and said "Pee Pee".

This officer asked the Victim if anything else happened and he said that "then she kissed my Pee Pee." The officer asked the Victim if anything was said by the Accused while she was playing this game, and he said, yes. The Victim advised that the Accused told him that "its good for you, it would make me (you) bigger."

The SRS social worker who testified at the hearing was also trained and experienced in child abuse investigations. Her testimony was consistent with following notes she made of the interviews conducted by her and the state trooper with the children and their mother, which she compiled shortly after those interviews:

[B.] says that [petitioner] gave him and [G.] a bath together, used dish-detergent for bubbles. [Petitioner] dried him off and he put his PJ's on. They went to living room and played a game on the couch. [Petitioner] pulled down his pajamas and his underwear and put her hands on his pee-pee. He was laying on his back on the couch. He told her to stop it and she said it was ok, that she could do it. She kept on doing it and then put her mouth on his pee-pee. He told her no. She said it was good for him and would make it bigger.

[G.] was in the room and saw what happened.

[B.] pointed to his penis when asked what his pee-pee was. He also undressed the little boy doll and held the penis and when asked, said that what [petitioner] did.

Both the state police officer and the SRS social worker struck the hearing officer as competent and dispassionate individuals. Their recollections and their notes of their interview with the children were consistent in details and circumstances, and are deemed to be accurate and reliable as to what the children reported to them at that time.

The petitioner's last employer (the director of an early childhood program where the petitioner was working before she was suspended pending the outcome of these proceedings), a neighbor (who is a sixth-grade teacher) for whose young children the petitioner has babysat, and a family friend of the petitioner all testified (credibly) that they have never observed or suspected any problems regarding the petitioner's interactions with young children.

The petitioner testified in her own behalf at the hearing that she has little recollection of the events in question because they happened so long ago. She did not remember the children taking a bath, but she did recall baking a cake with the children and later sitting with them on a couch in the living room. She denied bringing a "game" to the house, and she denied the children's allegations concerning any alleged abuse. On cross examination, however, she stated that she was not sure if she had baked a cake that night.

Although the petitioner was undoubtedly upset by the testimony against her at the hearing, she was not a very articulate and forthcoming witness. As noted above, at the time the allegations first came to light, she was questioned by the state police and later had a delinquency petition filed against her in juvenile court. Surely, this incident was a major traumatic event in her life. Although several years have since elapsed, her professed lack of recollection of the details of the incident at this time is suspect.

At the conclusion of the first day of hearings, SRS requested and was granted a continuance for the purpose of eliciting the testimony of B. and G., themselves. The hearing was reconvened on April 30, 1993, for this purpose. Over the petitioner's objection, the hearing officer ruled that the children would testify one at a time with their mother by their side not directly facing the petitioner, and that during direct and cross examination counsel would not interrupt with objections, which would be reserved instead for motions at the close of the children's testimony. Direct testimony of G., who went first, proceeded without incident. However, at the outset of the petitioner's cross examination of G. counsel for SRS raised repeated objections and became argumentative with the hearing officer's rulings. The witness, G., and her mother became visibly upset, and the examination had to be discontinued while they left the room. After considerable argument between counsel, and the hearing officer's admitted

incertitude, the examinations of the children continued more or less without incident.

Upon reflection, however, the hearing officer concluded that the ability of the petitioner to effectively cross examine the children was irreparably compromised by the antagonism and repeated clashes of counsel. Unfortunately, but not surprisingly, the children's testimony on cross examination became more guarded and defensive during and after the clashes of counsel. Because they were too upset to remain in the room while counsel continued arguing before the hearing officer, the children also had time to reflect upon their previous testimony and to confer with their mother and SRS personnel before their cross examination. This is not to say that the behavior of SRS counsel was intentional or contumacious, only that it lacked sensitivity to and respect for the hearing officer's attempt--in a difficult situation, with which he and the parties had had no prior guidance or experience--to protect both the interests of the parties and the welfare of the witnesses themselves. Certainly, neither party had anything to gain by upsetting the children, and it is possible that the conditions imposed by the hearing officer may not have been clear to SRS's counsel. As sincere and conscientious as the arguments and objections of SRS's counsel may have been, however, their effect on the witnesses was clearly (if unintentionally) prejudicial to the ability of petitioner's counsel to conduct a spontaneous cross



examination. Therefore, the testimony of both children is stricken in its entirety, and the hearing officer and the Board have completely disregarded it in rendering their findings in this matter. This leaves SRS with only hearsay evidence (seasonably objected to by the petitioner) to support its substantiation of the allegations. It is found, however, that the testimony and notes of the police officer and the SRS social worker, as set forth above, are sufficiently credible and reliable to meet the Department's burden of proof in this matter (discussed below).

ORDER

The petitioner's application to expunge the report in question from the SRS registry is denied.

REASONS

The petitioner has made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

- (a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be

destroyed.

. . .

- (h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the Department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The Board has repeatedly held that the Department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing not only that the report is based upon accurate and reliable information, but also that the information would lead a reasonable person to believe that a child has been abused or neglected. See, e.g., Fair Hearing No. 10,136 (Aff'd, In re Bushey-Combs, Vt. Supreme Ct. Dkt. No. 91-393; March, 1993.)

In applying its rules regarding hearsay testimony in these matters the Board has long recognized an inherent "unnecessary hardship"<sup>1</sup> in requiring children who may have been victims of physical abuse or neglect or sexual abuse to undergo the stress of testifying at a formal administrative proceeding in order for SRS to establish that the alleged abuse is "substantiated". See, e.g., Fair Hearing No. 10,136

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<sup>1</sup>See Fair Hearing Rule No. 14.

and In re Bushey-Combs, Id. The instant case painfully illustrates the difficulty in these hearings of obtaining reliable and unfettered testimony from alleged victims of child abuse. However, even though hearsay evidence that summarizes statements purportedly made by an alleged victim of child abuse has been held to be admissible in these matters, the board has required of SRS that its investigations be competent and thorough, and that its evidence in this regard be "accurate and reliable". Id.

In this case, it is concluded that this standard is met.

The state police officer and the SRS caseworker who investigated this matter were experienced and appeared to be unbiased. Their testimony and their notes reveal that B.'s allegations were specific and left little room for mistake or misinterpretation. Their investigation included a conversation with B.'s mother, who had initially reported B.'s allegations, and an attempt to interview the petitioner. Their respective written reports of the investigation, prepared separately shortly after the interview took place, were consistent with each other in their descriptions of B.'s allegations and the circumstances under which they were obtained.

The above evidence certainly does not rule out the possibility that the children's allegations against the petitioner were either simply made up or the result of some unwitting suggestion from their mother (and leading questions

by the interviewers) that became reinforced as "truth".<sup>2</sup> However, other than the petitioner's denial of the allegations and unsupported, if plausible, conjecture as to some alternative explanation, there is no evidence that would call into question either the veracity of the children and their ability to have accurately reported what allegedly occurred or their (or their mother's) motives in bringing these allegations to the attention of the police and SRS.

In light of the above, despite the striking of the children's testimony, it is concluded that SRS's "substantiation" of the report of child sexual abuse in question is supported by a preponderance of evidence.<sup>3</sup>

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<sup>2</sup>The Board has repeatedly observed that the failure of SRS to record its interviews with children undermines the weight to be accorded hearsay testimony as to what those children said. See Fair Hearing Nos. 12,079, 11,322, 9112, and 8646.

<sup>3</sup>"Sexual abuse" is specifically defined by 33 V.S.A. § 682 as follows:

(8) "Sexual abuse" consists of any act by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

In its "Casework Manual", provided to all its social workers and investigators, SRS has attempted to define further the requirements of the above statutes. Pertinent sections (see Manual No. 1215) include the following:

C. Sexual Abuse - The statutory definition is quite

Therefore, the petitioner's request to expunge the report from the SRS registry is denied.

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COMMENTS, PURSUANT TO RULE 17, REGARDING PROPOSED FINDINGS  
AND CONCLUSIONS SUBMITTED BY THE PARTIES

I. Petitioner's Objections and Proposed Findings and Conclusions.

1. Paragraphs 1 through 7 are either supported by the evidence or are uncontroverted.

2. Paragraphs 8 through 11 are supported by the evidence.

3. As to paragraph 12, there is no evidence that SRS's founding of child abuse against the petitioner was in any way

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explicit and all-encompassing, but provides little clarity around abuse by children and by adolescents on children. The Department differentiates sexual abuse by adolescents and children from other types of sexual exploration according to the following criteria:

1. The perpetrator used force, coercion, or threat to victimize the child, or
2. The perpetrator used his/her age and/or developmental differential and/or size to victimize the child.

In this case, because the petitioner has denied the allegations altogether, she has not argued that the alleged incident did not constitute sexual abuse within the above definitions. From the descriptions of the incident found above, however, there is no question that the act found to have been committed by the petitioner does meet the above definitions of sexual abuse.

based on her exercise of her constitutional right to remain silent during the investigation.

4. Paragraphs 13 and 14 are either supported by the evidence or are uncontroverted.

5. As to paragraph 15, the hearing officer admitted the witnesses' observations as to the children's demeanor at the time of questioning. However, the hearing officer considered no testimony, either direct or implied, regarding any witness's opinion as to the children's credibility; and no findings in this matter are based in any way on such testimony.

6. As to paragraph 16, SRS offered no evidence of the petitioner's character for untruthfulness. Therefore, the petitioner's offer of evidence as to her character for truthfulness was precluded under Rule 608, Vermont Rules of Evidence.

7. As to paragraph 17, as discussed above, the standard of proof in these matters is a preponderance of evidence.

8. Paragraphs 18 through 24 concern issues either specifically addressed or rendered moot by the hearing officer's striking of all the testimony of the children. See supra.

9. As to paragraph 25 and 26, there has been no showing that the hearing officer was not neutral or that the petitioner's due process rights have been violated.

10. Paragraphs 27 and 28 are essentially supported by

the evidence, but the hearing officer gave little, if any, weight to the testimony of the children's mother in determining what the children alleged the petitioner had done to them. The findings in this matter (see supra) are based almost exclusively on the testimony and written reports from the state police officer and the SRS social worker. However, the mother's testimony is not inconsistent with that evidence.

11. As to paragraph 29, the testimony of the children was stricken and was not considered by the hearing officer.

12. Paragraph 30 is an accurate summary of the petitioner's testimony in this matter.

13. Paragraph 31 is contrary to the hearing officer's conclusions (see supra).

14. Paragraph 32 was addressed by the board in its prior ruling in this matter.

## II. SRS's Proposed Findings and Conclusions.

1. Paragraphs 1 through 5 are supported by the evidence.

2. As to paragraph 6, the testimony of the children was stricken and the mother's testimony regarding what the children told her was not given much weight. Therefore, there is insufficient evidence to find that the petitioner brought a hand-held game with her when she came to baby-sit the children. However, the hearing officer does not consider this to be a crucial fact.

3. Paragraphs 7 through 17, to the extent that they are

consistent with the testimony and reports of the state police officer and the SRS social worker (see supra) are supported by the evidence. To the extent that they go beyond the information contained in those reports, and concern allegations that are controverted by the petitioner, they are not supported by the evidence.

4. Paragraphs 18 through 40 are supported by the evidence, except that in paragraph 21, the interviews took place in the SRS offices, not at the children's home.

5. As to paragraph 41, the testimony of the children has been stricken. Although the children's mother was a credible witness, her recollection was not deemed to be as reliable as that of the state police officer and the SRS social worker.

6. As to paragraphs 42 through 44, see No. 3 above.

7. Paragraphs 45 (both of them) through 46 are supported by the evidence.

8. Paragraph 47, though consistent with the evidence, is not considered relevant to the ultimate issue in this matter.

9. As to paragraph 48, this evidence was stricken and was not considered.

10. Paragraphs 49 through 52 are supported by the evidence.

11. SRS's legal arguments are addressed in the Recommendation itself or in response to specific rulings requested by the petitioner, supra.